

**BEFORE THE MERIT EMPLOYEE RELATIONS BOARD
OF THE STATE OF DELAWARE**

**IN THE MATTER OF
JOHN McAVANEY,
Appellant.**

**DOCKET NO. 96-08-100
DECISION AND ORDER**

BEFORE Katy K. Woo, Chairperson, Walter Bowers, and Dallas Green, Members,
constituting a quorum of the Merit Employee Relations Board pursuant to 29 *Del. C.* § 5908(a).

APPEARANCES

For the Department: Elizabeth D. Maron, Deputy Attorney General
Department of Justice
Carvel State Office Building
820 North French Street
Wilmington, Delaware 19801

For the Appellant: John McAvaney, *Pro se*
Phillip S. Williams, Sr., Staff Representative
AFSCME, Council 81
610 Basin Road - First Floor
New Castle, Delaware 19720-6412

NATURE OF THE PROCEEDINGS

This matter came before the Merit Employee Relations Board for an evidentiary hearing on March 6, 1997 pursuant to Merit Rule No. 21.0111 as a direct appeal by a former state employee who has been dismissed from employment.

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John McAvaney alleged that the Secretary of the Department of Transportation improperly terminated his employment as a toll collector without just cause in violation of Merit Rule No. 15.1. Mr. McAvaney, after consultation with his union representative, elected to have an open public hearing on this matter rather than have the hearing before the Board in Executive Session.

SUMMARY OF THE EVIDENCE

John W. Marinucci, presently employed as the Business Manager in the Division of Highway Operations with the Department of Transportation, was sworn and testified as follows:

On May 7, 1996, he was employed as the Interim Toll Operations Manager for the Department and in that capacity investigated a written complaint filed by a turnpike patron against Toll Collector John (Jack) McAvaney.

Mr. Marinucci identified State's Exhibit No. 1 as the handwritten complaint which he investigated and which stated:

I was called a nigger by your toll takers. Upon receiving my receipt from one of your toll personel. I said thank you buddy. He then replied I'm not your bud call somebody else your bud you fuckin' nigger. I then called him white trash and through a piece of chicken at him.

Mr. Marinucci testified that he conducted his investigation of this incident during the week of May 13, 1996 and, in the process of his investigation, called and interviewed the complaining toll patron by telephone. As a part of his investigation, he also interviewed Toll Sergeants Robert Goldstein and Thomas Simperts and Toll Collector Kathy Palmer who had been on duty at the time of the incident in the same toll booth. Mr. McAvaney was also interviewed during the investigation.

The witness identified State's Exhibit No. 2 as his two page memorandum dated June 13, 1996 which recorded the results of his investigation of the incident. Mr. Marinucci recounted that during his telephone interview with the complainant the description of the incident was almost verbatim with the written complaint. The description of the incident provided by Mr. Marinucci based on his investigation was that on May 7, 1996 the complaining motorist handed Collector #150, John McAvaney, \$1.25 and said "I need a receipt, buddy." Collector #150 stated, "I'm not your buddy" and used a racist epithet and profanity. The motorist, shocked by this seemingly unprovoked incident, called the toll collector "white trash" and threw a piece of chicken at him. The motorist exited the lane; cut across traffic; took the outside lane; parked his white van near the control room; and walked up to the Sergeant's office window. Sgt. Robert Goldstein took the initial oral complaint and gave the motorist a pen and paper and instructed him to write up the incident. While the motorist was writing up the incident, Collector #150, Jack McAvaney, called to the control room claiming to have been assaulted by the motorist and stated that he needed to go home. Sgt. Simpers, who was operating the control room while Sgt. Goldstein was dealing with the complaining motorist, took the call from McAvaney and authorized McAvaney to go home sick.

Mr. Marinucci testified that during his telephone interview with the complainant he learned that there was another toll collector in the booth at the time of the incident. It was a reversible double toll booth, and the other collector was determined to be Kathy Palmer. Marinucci stated that he had also interviewed Ms. Palmer. He showed her the handwritten complaint (State's Exhibit No. 1), and she responded that, "It happened just the way it is written there."

Mr. Marinucci testified that during his investigation he interviewed Toll Collector John McAvaney who provided a different version of the incident. Mr. McAvaney claimed that the motorist threw a sparerib at him, called him white trash, and then filed the complaint.

The witness testified that, based upon his investigation, the incident occurred the way it was described by the motorist, and he, therefore, recommended that Toll Collector McAvaney's employment should be terminated. McAvaney was placed on leave with pay pending the completion of the pre-termination hearing.

Mr. Marinucci identified State's Exhibit No. 3 as the letter which he hand delivered to Mr. McAvaney on May 28, 1996 advising him of his suspension with pay and of his entitlement to a pre-termination hearing. Witness Marinucci identified State's Exhibit No. 4 as the written report to Department Secretary Anne P. Canby concerning the pre-termination hearing held on June 25, 1996 by John J. Gilbert in which Hearing Officer Gilbert recommended John McAvaney's dismissal. The witness also identified State's Exhibit No. 5 as the employment dismissal letter from Secretary Canby to Mr. McAvaney dated July 1, 1996 and terminating his employment.

On cross-examination, John Marinucci testified that he only conducted a telephone interview with the complaining motorist and did not have a face to face meeting with him. In response to questions from the Board, Mr. Marinucci stated that he based his recommendation for dismissal exclusively on this incident and did not consider Mr. McAvaney's prior record and did not know if there had been any prior disciplinary actions taken against Mr. McAvaney.

John W. (Jack) McAvaney was sworn and testified that he had worked two and one-half years as a toll collector without any complaints or disciplinary actions and was innocent of the charge. He recounted that he was on duty as a toll collector when a white van came into his lane which was lane

number 9. There was a double toll booth, and Kathy Palmer was in the booth about three or four feet away with her back to him. Her lane was closed, and she was awaiting maintenance. According to McAvaney, the driver of the white van slapped the money in McAvaney's hand and said, "I need a receipt buddy." McAvaney testified that he told the driver, "Here is your receipt but I'm not your buddy." According to McAvaney, the driver then said, "Here you white trash, take this" and threw a piece of chicken at him. McAvaney testified that for this he was suspended with pay for two months and then fired, and he did not understand why because he had done nothing wrong. McAvaney testified that after the chicken was thrown he turned to Kathy Palmer and asked her if she saw what had happened, and she said, "No." McAvaney testified that he had barbecue sauce on his jacket; that he was upset; and so he went home.

On cross-examination, Mr. McAvaney testified that he did use the terms "fucking nigger" during the incident but that he did not say it to the driver's face but rather as the white van pulled forward past the toll booth because he had just been called "white trash" and had barbecue sauce all over the front of his jacket.

At the conclusion of the Appellant's presentation, the Board reserved judgment on the Department's motion to dismiss the appeal because of the failure of the Appellant to meet his burden of proof that there had not been just cause for the termination. In rebuttal, the Department called Toll Collector Kathy Palmer who was sworn and testified as follows:

On May 7, 1996, she was working as a toll collector in lane number 8 and shared a booth with Jack McAvaney. Her back was to the incident, and she did not see it, but she heard the back and forth exchange between McAvaney and the motorist, and the version on the motorist's written complaint was correct as to the sequence of the name calling.

THE LAW

29 Del. C. § 5931. Grievances.

"The rules shall provide for the establishment of a plan for resolving employee grievances and complaints. The final two (2) steps of any such plan shall provide for hearings before the Director or the Director's designee and before the Board, respectively, unless a particular grievance is specifically excluded or limited by the Merit Rules. The Director and the Board, at their respective steps in the grievance procedure, shall have the authority to grant back pay, restore any position, benefits or rights denied, place employees in a position they were wrongfully denied, or otherwise make employees whole, under a misapplication of any provision of this Chapter or the Merit Rules. The rules shall require that the Board take final action on a grievance within ninety (90) calendar days of submission to the Board. Upon approval of all parties, the ninety (90) days may be extended an additional thirty (30) calendar days."

Merit Rule No. 15.1

"Employees shall be held accountable for their conduct. Measures up to and including dismissal shall be taken only for just cause. 'Just cause' means that management has sufficient reasons for imposing accountability. Just causes requires:

- showing that the employee has committed the charged offense;
- offering specified due process rights specified in this chapter; and,
- imposing a penalty appropriate to the circumstances."

FINDINGS OF FACT

The Board is presented with two versions of the altercation which took place at the toll collection booth on May 7, 1996 between Toll Collector John McAvaney and the complaining motorist. In Mr. McAvaney's version, after telling the motorist that he was not his "buddy," McAvaney was called "white trash" and hit in the chest with a barbecue sauce covered piece of chicken. The motorist's white van then pulled away from the toll booth; McAvaney shouted out the epitaph which was the subject of the written complaint; the motorist then crossed against traffic and went to file the handwritten complaint which was State's Exhibit No. 1.

The complainant's version as set forth in the written complaint has Mr. McAvaney as the instigator of the racial name calling with the motorist responding in kind. This version is supported by both the results of the investigation of John W. Marinucci and the testimony of Toll Collector Kathy Palmer.

The Board, having weighed the conflicting versions and the testimony and material presented in support of each, finds that the preponderance of the evidence presented at the hearing supports the complainant's version of the incident. The Board also finds that Mr. McAvaney was offered and afforded the due process rights provided by Chapter 59 of Title 29 and by the Merit Rules and that the penalty imposed was appropriate to the circumstances.

DISCUSSION AND CONCLUSION

It is not unreasonable to expect that State employees who are hired to interact with and serve the public on a daily basis will do so with reasonable courtesy and competence as a condition of continued employment. It is certainly to be expected that persons dealing with such employees will not be subjected to name calling whether it be racial in nature or otherwise.

By law, the burden of convincing the Board that his termination from state employment was without just cause rests on Mr. McAvaney. To prevail, he must convince the Board to rule in his favor by a preponderance of the evidence, and the Board unanimously determined that Mr. McAvaney has not met that burden. All of the Board members hearing this matter unanimously conclude that on the facts presented, the appeal of John McAvaney should be denied and the action of the Secretary upheld.

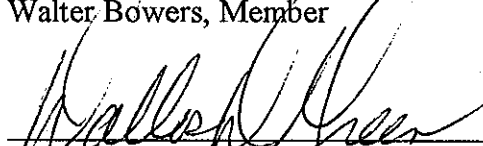
ORDER

For the foregoing reasons, the appeal of John McAvaney from his termination of state employment is denied by unanimous vote of the undersigned members of the Merit Employee Relations Board, and the termination action of the Secretary is upheld.

IT IS SO ORDERED:


Katy K. Woo, Chairperson


Walter Bowers, Member


Dallas Green, Member

APPEAL RIGHTS

Pursuant to 29 Del. C. § 5949, the Appellant may appeal to the Superior Court. The burden of proof in any such appeal to the Superior Court is on the Appellant. All appeals to the Superior Court are to be filed within thirty (30) days of the notification of the final action of the Board.

Mailing Date: April 8, 1997

Distribution:

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Merit Employee Relations Board

Katy K. Woo, Chairperson

Walter Bowers, Member

Dallas Green, Member

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KATY K. WOO, CHAIRPERSON
ROBERT BURNS, VICE-CHAIRPERSON
WALTER BOWERS, BOARD MEMBER
GARY FULLMAN, BOARD MEMBER
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May 29, 1997

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610 W. Basin Road, 1st Floor
New Castle, DE 19720-6412

Re: John McAvaney v. DelDOT
Docket No. 96-08-100

Dear Ms. Maron and Mr. Williams:

Attached please find an amended copy of Page 3 of the Decision and Order issued by the Board on April 8, 1997 for the above-referenced matter.

This amended copy is being issued to reflect the replacement of the word "epitaph" (1st paragraph, line 7) with the correct word "epithet" as was originally intended.

I apologize for any inconvenience this error may have caused you.

If you have any questions, please call.

Sincerely,

A handwritten signature in cursive script, appearing to read "Jean Lee Turner".

Jean Lee Turner
Administrative Assistant

/jlt

Attachment

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